340.09756
W783c
c.2

A CENTURY OF LAW IN NORTH CAROLINA.

By

Robert Watson Winston

Digitized by the Internet Archive
in 2011 with funding from
State Library of North Carolina

http://www.archive.org/details/centuryoflawinno00wins

North Carolina State Library
Raleigh

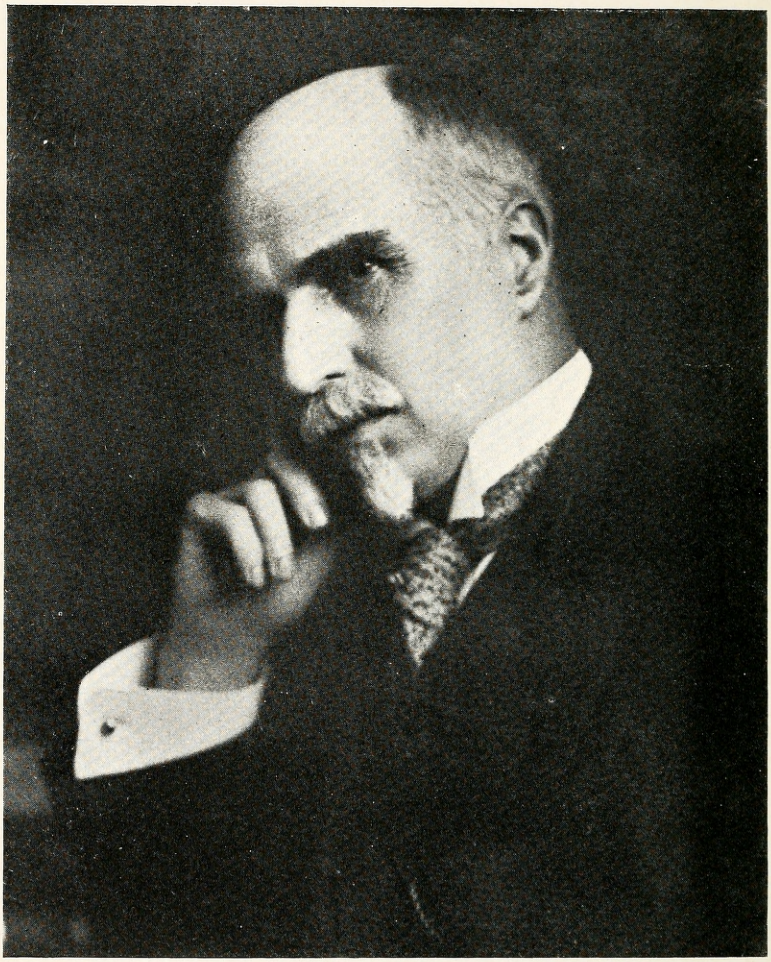
A CENTURY OF LAW IN NORTH CAROLINA

By ROBERT WATSON WINSTON

THEY WISHED MEN TO BE FREE
FROM MOBS, AS WELL AS KINGS
FROM YOU AS ME

340.09756
W783c
c.2

A CENTURY OF LAW IN NORTH CAROLINA



ROBERT WATSON WINSTON

A CENTURY OF LAW IN NORTH CAROLINA

BY

ROBERT WATSON WINSTON, A.B., B.L., LL.D.

A fair test of the worth of a government is the affection in which it is held by the citizen. It is by this standard we love to measure our brave State. Wherever a North Carolina man may go, his heart remains with his people; the sylvan Toé wanderer through the woods; Mount Mitchell, standing forth without a peer; the bleak sand-dunes of Nags Head—every foot of ground is dear to us. As the wintry winds blow through her forests of pine, or the sounding waves beat against the shores, where Virginia Dare was born, or the Cape Fear majestically sweeps to the deeper sea, it is of Moore's Creek, Guilford, King's Mountain, and of freedom, they tell—it is of unyielding resistance to unjust authority, of undying devotion to free government, based upon law. This is our heritage, this our birthright.

How has it come about, that there is still one spot on this mad and frantic globe, one spot where no red flag has ever waved, where the people are confiding and contented, where the God of our fathers is still enthroned?

CONSTITUTION—ARK OF COVENANT.

One who loves his State as a true son should love her will try to make true answer. We are a people, one in race, one in language, one in religion, and one in ideals; a people without itching ears. We have no great cities; our per capita wealth is evenly distributed; eighty per cent of our population are tillers of the soil; more than fifty per cent of the white adults are landowners; less than one-half of one per cent are foreign born—great auxiliaries, no doubt, to a stable and conservative government—but greater, far greater, than these are our just and equal laws, administered without fear, favor or affection, reward, or the hope of reward. If our sister States of the South have had such statesmen as Jefferson, Calhoun, and Clay, they have had no such jurist as Ruffin. Morley, I think, rightly contends that the great magistrate has as least as good a title to the front place in the Temple of Fame as the highest political servants or leaders of the State.

The distinguishing feature of our American Commonwealths is their constitutions. The attitude of North Carolina toward her Constitution

---

Address of Judge Winston of the Raleigh Bar before the North Carolina Bar Association in the Supreme Court Rooms at Raleigh, N. C., on the 4th of January, 1919, being the occasion of the Celebration of the Hundredth Anniversary of the Establishment of the Supreme Court of North Carolina. Reprinted from 176 N. C. Reports and from Proceedings of N. C. Bar Association.

manifests the reverence in which we hold it. Only once in a hundred and forty years has North Carolina materially changed her fundamental law. Louisiana and Georgia have each had seven constitutions; Virginia, Arkansas, and South Carolina have had five each; Pennsylvania four, and Illinois, New York, and Delaware three each.

As to our national charter, others may look upon it as dishonest, but North Carolina judges, in the main, agree with Burke that no man should approach to look into its defects or corruptions but with due caution; that he should never dream of beginning its reformation by its subversion; that he should approach to the faults of the State as to the wounds of a father—with pious awe and trembling solicitude. By this wise prejudice, we are taught to look with horror on those children of their country who are prompt rashly to hack that aged parent in pieces and put him into the kettle of magicians, in hopes that by their poisonous weeds and wild incantations they may regenerate the paternal constitution and renovate their father's life. Our judges feel, with Webster, that written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former. Bryce expressed the same idea that our National Constitution is the ark of the covenant, whereon no man may lay rash hands; and Bryce was but following De Toqueville, M. Emile Boutmy, Gladstone, Lieber, and Henry Maine.

Our first State Constitution was adopted at Halifax in 1776. Its founders were determined that not one drop of blood which had been shed on the other side of the Atlantic during seven centuries of contest with arbitrary power should sink into the ground, but the fruits of every popular victory should be garnered up in this new government. Neither Greece nor Rome was their model, nor was Plutarch's Lives or Rousseau's Social Compact their guide. Unlike Mirabeau, Danton or Robespeare impracticable, high-sounding, they were level-headed and workable men; Hooper, Harnett, Abner Nash and Samuel Ashe, the conservatives, standing stoutly against the radicalism of Bloodworth, Person, and Wiley Jones. The result of their deliberations was a wise and practical compilation of the fundamental principles which mankind, climbing upward for centuries, had wrested from kings and tyrants, each word wet with the blood of heroes; Magna Charta of King John, of Henry III. and Edward I., the Petition of Rights of Charles I., and the Habeas Corpus acts of Charles I. and Charles II., and the great Bill of Right of William and Mary.

One hundred years ago, and as it is today, the common law of England was the law of this State, and there were then few statutes regulating human conduct or controlling human affairs. At that time our highways were of mud; there were no railroads, few corporations, no complicated machinery, and little commerce. The common law of England was well adapted to these primitive conditions and to the life of a simple and turbulent people, its very rigidity and harshness increasing its effectiveness. It was a day of abstractions and scholasticism. Schol-

ars were interested in words, not in things, their concern largely being to distinguish and divide a hair twixt south and southwest side.

It is not fair, I think, to berate our forefathers because they did not enjoy the blessings of universal suffrage and the benign laws which we have today. More urgent things at that time demanded their attention. First the blade, then the ear, after that the full corn in the ear. They had not forgotten the military policy of the Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who poured themselves all over Europe after the fall of the Roman Empire and established the feudal system on the continent and in England; so firmly indeed in England that not until the twelfth year of Charles II. was it abolished (and in Germany not until November 11, 1918). A system of slavery more complete cannot be imagined, with its aids, relief, primer—seisin, wardship, control after marriage, fines and escheats. Nor were the doings of the Stuarts and the Georges forgotten, taxation without representation, the suspension of the writ of *habeas corpus,* ship money, the forfeiture of charters, and the encroachments of the sovereign. The early patriots greatly feared a judge owned by king or commonwealth, whose sole office was to do his master's bidding. Bloody Jeffreys was to them more than a warning, and they resolved that another Thomas More should not die for conscience sake, nor should another Bedford jail imprison a Bunyan, innocent of crime. Free speech, free thought, free conscience, a free religion, and the fundamentals of a free existence mightily concerned our forefathers in '76 and 1819.

North Carolina Found Herself, 30 to 40.

North Carolina was not ripe for progress until the decade, 1830 to 1840, when England's reform movement of 1832 abolishing slavery, emancipating the Catholics, and culminating in the reform bill of that year swept across the Atlantic and made its impress on this Commonwealth. In 1835 a constitutional convention composed of the ablest men of their day was held in Raleigh. It changed the basis of representation by abolishing borough towns, which had possessed the right, *suo vigore,* of additional members in the General Assembly; by taking away from the General Assembly the election of the Governor and by giving this privilege to the people; by taking the right to vote from free negroes, and by striking out the sectarian test for office-holding. These reforms were passed by the smallest margin possible—31 to 30 in the Senate, four Eastern Senators uniting with the Western Senators chiefly from patriotic motives, but also because of the Catholic emancipation provision which removed all doubt of the right of the beloved Judge Gaston to hold the office of Supreme Court Judge, to which he had just been appointed. An era of prosperity followed. The old *laissez faire* policy of Nat. Macon received its first blow. The attention of the State was turned toward the building of roads and highways, the inauguration of

a public school system, the deepening of rivers and harbors, the construction of railroads, and to general internal improvements.

In 1833 a great industrial convention had been held in Raleigh. It was composed of a hundred and twenty-five delegates from many counties. Many delegates favored a plan of railroad construction from north to south, but a larger number advocated connecting our seaboard with the mountains of this State and Tennessee. The plan finally adopted was to construct a railroad from Shephard's Point, now Morehead City, running through Goldsboro, Raleigh, Greensboro, thence on to Asheville, Murphey and Ducktown.

"To this era belong the erection of the present State Capitol, the building of the North Carolina Railroad, the Atlantic and North Carolina Railroad, the beginning of the Western North Carolina Railroad, the organization of the North Carolina Agricultural Society, the erection of the first hospital for the insane, the founding of the State School for the Deaf and Dumb and the Blind, the establishment of a system of public schools, the expansion of the University from a local high school with ninety students into a real college, whose five hundred students represented every State from the Potomac to the Gulf of Mexico, and many other progressive measures that lie at the very foundation of the present prosperity, honor and glory of the State."

These forward movements came none too soon. Prior to 1830-40 the old State was in a bad way educationally, industrially, and politically. Few of the people could read and write. East was divided against West. The rotten borough system gave the balance of power to the Eastern counties, having a smaller population than the West, and atrophied by hundreds of thousands of human beings in slavery. Previous to the Convention of '35 the Governor had usually been so subservient to the Legislature that made him that he was merely a figure head. From '30 to '40 the population of the State was practically at a standstill. The census of 1850 showed that one-third of all native North Carolinians were living in other States. It has taken many years and much effort to overcome the inertia of those dreary days. That our people did not perish is due to the vision of those early men of the Republic who guided and followed its destiny.

Time would fail me to tell of the vision of Archibald D. Murphey, the wisdom of Swain, and the labors of Bartlett Yancey, Joseph Caldwell, Calvin H. Wiley, John M. Morehead, Calvin Graves, William A. Graham and others. Suffice it to say, that because of these men and of their co-laborers in executive chair and legislative halls there came about an "era of progress that within the next quarter century raised North Carolina from the lowest to the highest rank among the slave-holding States of the South in all those things that make for the material, intellectual and social uplift of the people."

Modern Material Progress.

The work of these men has been taken up by Vance, by Jarvis, and by Aycock, until the dream of Murphey has become the commonplace of today. Railroads bisect our State from sea to mountains; Beaufort is soon to be a real harbor of refuge. An inland waterway uniting our sounds and bays and lakes from the harbor of Boston to the mouth of the Rio Grande seems assured; the great Bankhead and Capitol to Capitol Highway, and lateral highways, make travel easy and delightful; a six-months school term, just provided by constitutional amendment, will move us high up from our old place near the foot of column of illiteracy. Chapel Hill, under the guidance of Battle, Winston, Alderman, Venable, and Graham, has become, if not the foremost, perhaps the most serviceable, university of the South; and the brain of McIver conceived, and with the aid of Noble, Joyner and others, has made possible the higher education of our women. Spirituous liquors have been excluded from the State, and other progressive and benign laws have been put into effect. Agriculture has not been neglected. The A. & E. College has a great future. Seed selection, soil analysis and fertilization, crop rotation, animal industry, pig clubs for boys, canning clubs for girls, farm-life schools and comprehensive home demonstration work are remaking our rural sections. Today North Carolina spins more cotton than she produces (and more than any Southern State), raises more wheat than she consumes, has the largest per acre cotton yield, is first in the value of tobacco produced, near the top in the production of sweet potatoes, peanuts, apples, peaches and sorghum, and is in the seventh or eighth place in the aggregate wealth of her farm products.

The most radical change in our fundamental law took place in 1868, when a new Constitution was adopted. The Constitution of 1776 dealt with general principles only, leaving the details to legislative control and supervision, whereas the Constitution of 1868 deals with the details of Government. Of such constitutions, Bryce says that they are no more than codes. It may be remarked that prior to 1868 there were no appeals from our Supreme Court to the Supreme Court at Washington. Now, such appeals are frequent, having to do with interstate commerce, the violation of contracts, Employers' Liability Act, and the Fourteenth Amendment to the Constitution.

Enlarged Democracy.

In the last century much has been accomplished through the law-making power to meet the spirit of an enlarged and universal democracy. Human slavery has been abolished and the former slave and his descendants enrolled among the electors. A homestead of one thousand dollars in land and five hundred dollars in personal property has been provided. By the Constitution of '76 only persons owning fifty acres of land could vote for a State Senator, now all electors vote for such Senator. All

judges, county and State officials, including the Governor and United States Senators, are now elected by popular vote. A State Primary Law has been on the statute books a short time. It has not been sufficiently tested to justify itself. In State elections at least, it seems to be a failure. The door is open quite wide for any person to become a candidate, but the cost and labor of reaching the voter is great, and there are fewer entrances for office than under the old convention plan. The average elector knows little of an obscure candidate residing in some other county. No doubt the primary will be of value in emergencies, when the advocate of some great popular movement and his cause have become one in the minds of the people. Imprisonment for debt has been abolished; dueling, lotteries, and gambling, thought to be the special privilege of gentlemen a hundred years ago, have succumbed to corrosive statutes sustained by a wise public sentiment. The rights of women have been greatly enlarged. Women are now entitled to the products of their own labors and to damages recovered for injury to her person or property; she may sue alone, execute a contract, and make a will disposing of her real and personal property without the consent or joinder of her husband. And she may be divorced for the one cause formerly allowed to the husband alone—adultery.

Technicalities Abolished—Humane Laws.

The Code of Civil Procedure, modeled after the Code of New York, was adopted in 1868. It supplants common law, pleading, and practice. John Doe and Richard Roe and Jacob Moreland, the impecunious common vouchee, are no more. No longer does the irate landowner begin his action by the absurd way of writing a note addressed to his "dear" friend, demanding an interest in the term. All such fictions are swept away and in all cases the real party in interest must now bring suit. The distinction between law and equity has been abolished. There is only one form of civil action. Pleadings have been greatly simplified and must contain a plain and concise narrative of the facts, and are to be liberally construed for the promotion of justice. A defendant in a civil action can testify in his own behalf. Proceedings supplemental to execution have taken the place of equitable *fi. fas.* and other suits to discover assets of dishonest debtors.

We sympathize with our forefathers in their fears of judicial tyranny and appreciate the safeguards which they threw around an accused person, but it would seem that they sometimes exceeded the bounds of caution. Take the first case in this Court. It may be found in 3 Murphey, at page 1 (*State v. Jim*). It seems that one Jim, a slave, was indicted for breaking into a dwelling-house with intent to steal a bank note. The indictment concluded most fortunately for the aforesaid Jim, "contrary to the form of the *statute* in such case made and provided." Now at that time there happened to be two statutes regulating

the larceny of bank notes. The bill, therefore, was quashed and a new trial granted because it concluded in the singular "contrary to the form of the statute" in such cases made and provided, instead of in the plural "contrary to the form of the statutes" in such cases made and provided. "The defendant is by this indictment," said the Court, "referred to one statute. Which shall he examine to prepare his defense? Whilst he is preparing his defense under one law, the prosecutor is arranging the charge under another, and by the perplexity thus occasioned an innocent man may be surprised into a conviction."

There has been progress since *State v. Jim!* Indictments, and specially those for murder and perjury, have been much simplified and shortened. They need not conclude against the form of the statute or statutes at all. It is not necessary to give the exact date of the alleged offense or the exact amount alleged to have been stolen. Our statutes of jeofails have wisely cured all these trivialities. The accused person may testify in his own behalf, and when the guilty party is finally convicted the sentence is executed under an order of the Governor, without awaiting the next term of court.

Death by electrocution has been substituted for hanging and corporal punishment has been abolished. The number of capital felonies has been reduced from a round dozen or more to four. Murder has been divided into first and second degree—first degree being that accomplished by premeditation, deliberation, and willfulness, such as burning, poisoning, torturing and lying in wait. Burglary has been divided into two degrees, it being now punishable with death only when the felony is committed in the night-time, in a dwelling, actually occupied, and the same as to arson. We no longer imprison children in the State's Prison or the jails; we commit them to the boys' reformatory or training school. And perhaps the most salutary change in the treatment of prisoners relates to their life in prison. The humane spirit of the day demands clean and well-ventilated jails and county homes, wholesome food and good clothing, various forms of diversion, rewards for good conduct, a division of the unfortunates into three classes—one called the Honor Class—and some compensation, but not yet enough for work performed. One visit more from Mrs. Ballington Booth, sister to the man "within closed walls," with her large sympathy and moving eloquence, and Jack Mills himself would be pleased with our prison conditions, I am sure. To Dorothy Dix and James C. Dobbin we are largely indebted for our first hospital for the insane, and this was followed by other like hospitals and by hospitals for the deaf, dumb and blind, the tubercular, the feeble-minded, and homes for orphans, a total of more than five thousands of these unfortunates now having the tender care of the State.

Remedial Statutes—The Code.

Statutes of a general character have also been passed to facilitate the administration of justice. Statutes have no roots, we are taught, but

judicial decisions are seldom without them. And yet, behind many a remedial statute is some dissent of a virile minority, or some impossible situation into which the law has been thrown by an ill-considered decision. There may be, and often is, a long struggle between the forces of reaction and of progress, but the end may be seen from the beginning. Take, for example, the opinion of Lord Abinger, Sir James Scarlett, England's greatest advocate, in the case of *Priestly v. Fowler,* holding that the master is not liable for the negligence of a fellow-servant. It took three-fourths of a century to reverse this wrong to society. It furnishes, says the Ohio Court, one of many instances of how little some of the most shining talents of the advocate appear to prepare their possessor for the office of judge. The first fellow-servant decision in this State was *Ponton v. R. R.,* and it followed the English decision. This doctrine of fellow-servant was abolished by statute in North Carolina not until the year 1897.

Perhaps the wisest of these remedial statutes is the Connor Act of 1885, requiring all deeds to be registered, and practically placing an unregistered deed on a footing with an unregistered mortgage. Prior to said act, no one could with safety make a loan on North Carolina lands, and foreign capital avoided the State.

Because of such decisions as *Busbee v. Commissioners,* declaring that an action to remove cloud from title to land would not lie if the complaint alleged that the said claim was invalid ("what is the necessity for the suit, then, if the claim is not good," said the Court, and dismissed the action), the Jacob Battle Act was passed, and now any person, whether in or out of possession, can bring a party into court claiming an interest in land and contest his claim and remove the cloud. If one makes obligation to convey land and afterwards dies his executor or administrator, after the obligation is registered and upon receipt of the purchase money, may execute a valid deed to the obligee.

You may now join in one suit a cause of action for debt, or on account, or for tort, and in the same action attack defendant's fraudulent deed executed to avoid paying his just obligations. Great progress has been made in retaining jurisdiction of causes, if the court to which the appeal has been taken has jurisdiction, although the court in which the litigation originated had no jurisdiction. Amendments to pleadings and to records, even in this Court, are liberally allowed in the interest of substantial justice.

Napoleon was no doubt the most versatile of the children of men. He reformed everything—war, finance, arts, government, religion, and the law. On his Code Napoleon his fame rests secure. To simplify and perfect the law has been the labor of mankind from Lycurgus to David Dudley Field and Roscoe Pound. The problem is how to so simplify the law as to avoid technicalities and delays and yet preserve personal and property rights. This great task has had the attention of this Court and of this Association and much free advice has been offered by

enthusiastic reformers both on and off the bench. I submit, with becoming diffidence, that *the only remedy is the trial judge.* Continuances are too easy, cross-examinations too prolix, and speeches too long—and these are evils the trial judge can correct. There are no delays in this our Supreme Court. With each recurring first Tuesday in February and last Tuesday in August, as that faithful old timepiece ticks out its ten of the o'clock, a brand new bill of fare, *a la carte,* is ready for the expectant brethren whose speeches of three-hours length, cut to thirty minutes under Rule 33, come forth under high pressure.

It is the sense of the lawyers of this State generally, I think, that the Code of Civil Procedure, together with the amendments, under the liberal construction of this Court, gives the framework for the speedy and safe dispatch of the business of courts. The Code of Civil Procedure is an improvement on common-law pleading and practice, as cases are now tried on their merits and upon the main issue. The Code may not be so accurate or scientific as common-law practice, and undoubtedly it gives this Court great leeway to affirm or reverse in the interest of substantial justice without doing violence to any well-recognized legal principle. Adopted at the end of the Civil War, brought to this State by carpet-baggers and scalawags against the wish of bench and bar, the fact that it is still with us is the best evidence of its worth. It is rarely the case that a new trial is granted because of a mistaken remedy under the Code. If one is in doubt as to whether he will bring an independent action or make a motion in the original cause, he simply does both and then consolidates. I have examined the last volume of our Reports and find that no new trial is therein granted because of error in pleadings. Judge Dillard while a member of this Court was in doubt as to whether he should accept the degree of LL.D. from the University, because he did not know whether old Mybra Gulley should have brought an independent action or moved in the cause! If this is the only obstacle to such honors we should now have many learned doctors in our midst. Much delay would be avoided if a three-fourths or four-fifths verdict were allowed in civil cases. The Legislature of 1919 will do the State some service if it shall break away from this fetish of a unanimous verdict. It seems strange that in a republic where the majority rule and rule supreme, and with the delays and wastage of hung juries, we should still require all twelve jurors in civil cases to be of one mind.

The doctrine of harmless error, like a specter, haunts appellants. If the merits are with the appellee, if substantial justice has been done, he may feel reasonably safe; but if an act of injustice can be seen in the record, well may he tremble—the slightest error will undo him. The tragedy of the law is when some appellate court, in the interest of supposed innocence or to suppress a supposed fraud, wanders from the beaten legal path and at the same time fails to discover on which side justice really lies. Failing to set forth in the record what the excluded

answer to the obnoxious question would have been is the lion in the pathway of new trials if substantial justice has been done; but if injustice has been enacted into law, this usually benign and sleeping principle awakens into life. *"Quacunque via data,"* justice is done, *"Fiat justitia ruat coelum."* Sometimes the trial judge excludes a mass of incompetent evidence, and afterwards in arraying the contentions to the jury repeats such excluded evidence. It is exasperating to hear the appellate court say in a cold manner that they do not grant new trials because of error of the judge in arraying evidence. In addition to the codification of our Civil Procedure, we have codified most wisely the law of "Negotiable Instruments," "Corporations," "Partnerships," and "Executors and Administrators."

To be a judge satisfactorily to one's self is not, nowadays, an easy task. He should be just and do right and not thwart the intelligent will of the people; but he must not decide so as to make himself ridiculous in the eyes of the judicious and to the delight of the groundlings. To be a judge and yet to so miss the law that impartial law journals and writers hold one's opinion up to merited ridicule, what could be more galling! Of the Chief Justice's opinion in the *Tobacco Cases,* Judge Harlan, in his dissent, declared that it was as sensible and learned as if he had said that black was white and white was black. Sometimes it happens that an error is made in an opinion of the Court, funds are distributed under the erroneous opinion, a petition to rehear is filed and, perforce, denied, and the principle is finally overruled in some other appeal. The point first decided, and then reversed, was that the lien of a judgment on the lands of a debtor should be displaced in favor of a junior mortgage.

Other Statutes—Court Practice.

An examination of the Revisal will disclose that scores of sections have been enacted to fill some gap in the law, to meet some knotty problem, or to resolve a doubtful construction. One wise statute, as Professor Mordecai in his Lectures remarks, is worth a dozen decisions of the Court. For example, our betterment statute, in some cases, takes the place of a vendor's lien; the question which puzzled the Washington Supreme Court, "Is a husband who kills his wife entitled to the insurance on her life?" is put at rest by a statute denying such right; nor is a divorced person entitled to any portion of the estate of the spouse. Ungathered crops of a decedent belong to the personal representative and shall not pass to the widow under a will. The appointment of a person as executor shall not discharge a debt due by him to the estate; heirs shall be jointly and not severally liable for the debts of their ancestor, but not beyond the property acquired. Lord Campbell's Act, giving a suit for death by wrongful act, is a part of our jurisprudence and is

most liberally construed. In many States the Employers' Compensation Act has superseded this statute. All doubt as to the legal status of illegitimates and half-blood and after-born children has been removed by statute; and wise provision has been made to supply lost or burnt records or to make easy proof of the same. Curative statutes relating to defective probates and registration of conveyances have served a useful purpose in strengthening and preserving titles to real estate; and the actual possession of land for a short time under color, or for a longer time without color, ripening such possession into a legal title, has been wisely provided. Ours is the only State requiring a greater length of time to ripen title by adverse possession as between tenants in common than between strangers. Our registration laws meet the requirements of the Federal Reserve system, and much money has been invested therein on the easy amortization plan to persons actually engaged in agriculture. Time, which is silently pulling down and destroying the handiwork of man, is just as surely building up the title to his real estate in possession. Legacies which formerly lapsed if the legatee predeceased the testator are now preserved in the lineal line. The attempt to cure by statute defects in deeds because of vagueness of description has naturally proven abortive. The statute of frauds requires all contracts relating to land to be reduced to writing; and if the deed is lacking in an essential element, no statute can supply the defect. Stocks of goods may not be sold in bulk except upon notice to all creditors; and assignments for the benefit of creditors are safeguarded, the assignor being required to file his list of creditors and make due report to the clerk of the Superior Court. Suits for libel and slander are of ancient origin. The absurd ruling that "The greater the truth the greater the libel" has long since gone to limbo, and almost anything pertinent to the controversy, even rumors, will be admitted in mitigation of damages. Seisin, which gave the old courts much trouble to define and apply, has been defined by statute to be any right, title or interest in the inheritance. This has been construed to enable the husband to inherit from his deceased child, leaving no brother or sister or descendants of such, and though there may be an outstanding estate by the curtesy or for life and although the husband was not of the blood of the ancestor from whom such child inherits. That is to say, the husband is seized of the inheritance despite an outstanding particular life estate. But one is not entitled to a homestead, or to dower, in a remainder.

Attitude of Courts to Statutes.

Let us now consider the attitude of this Court towards the work of the lawmakers. Has this Court heard the voice of the people? The late Col. Tazewell Hargrove used to tell the story of an old man who lay dying. His two sons, one weak-minded, having been called to his bedside, he said, "My dear boys, to Thomas I am going to leave the bulk

of my fortune, and I will appoint you, Richard, his trustee." "Father," said the weak-minded youth, "won't you give Dick the bulk of the estate and make me *his trustee?*"

We recall that Jefferson wrote to Roane, "If the judges have the power to annul statutes in conflict with the Constitution, then the Constitution and laws are a mere thing of wax which they may twist and shape into any form they please." The power of courts so to do has been disputed at all times. North Carolina, though "the freest of the free," was a pioneer in upholding such power. In 1787 the highest Court in this State declared an act of the Legislature unconstitutional and void, Judge Iredell upholding the power and Governor Richard Dobbs Speight championing the opposition. Iredell addressed an open letter to Speight, which text-writers pronounce the ablest and most complete exposition of the power of the judiciary over unconstitutional legislation which had appeared in the whole literature on the subject. Governor Speight maintained that the judiciary had usurped all the functions of government. Judge Iredell replied that when a judge took an oath to support the Constitution, this oath ought to bind him, and that if an act of the Legislature conflicted with the Constitution, to sustain it would be to do violence not only to the Constitution but to the oath he had taken.

The members of this Court, at its organization in January, 1819, were of the Iredell school of thought. Chief Justice Taylor and Judge Hall were graduates of William and Mary College, the college of John Marshall, with whom they, as well as Judge Henderson, the ablest judge on the bench, were in full accord. They maintained that it is the duty of a judge to exercise his judgment, and not his will, and that judges should be free and independent.

We read in John Quincy Adams' Diary a remark of Senator Giles of Virginia, that he and men of the Jefferson school treated with the utmost contempt this idea of an independent judiciary.

In a few months after this Court was organized, the epoch-making opinion of Marshall in the *Dartmouth College case* was delivered, holding that the charter of a college was a contract which the Legislature of New Hampshire had no right to alter in any material respect without the consent of the trustees. It may be remarked that Justice Gabriel Duvall, without writing a word, dissented himself into immortality.

North Carolina was soon confronted with a similar question in the famous case of *Hoke against Henderson.* The question here presented was whether an office is the private property of a citizen. This Court held that it was, and that he could be deprived of it only by the law of the land. *Hoke against Henderson* was not reversed until early in the present century, when it was held that an office is not based on contract, but is held by right of tenure and is subject to the control of the Legislature. Many vigorous dissents were filed before this consummation came about. When courts cease to be farseeing and give utterance

to doctrines opposed to orderly and natural progress and development, as in the *Dartmouth College case,* the *Dred Scott* decision, the *Income Tax cases,* they invite attack. It is to be wished that judges may so administer the important trust committed to them, with an eye not only to precedent but to manifest destiny, to things not of today or tomorrow but of a hundred years hence, that further attacks upon the system of which they are exponents will not be made.

The doctrine of the recall of judicial decisions is so humiliating to an honest-minded judge that an office held subject to such thralldom would have as little of honor as of emolument. Our judges were first appointed by the Crown, afterwards by the Executive (together with the Council of State), then by the Legislature, and since 1868 they have been elected by the people. In some States the final plunge has been made and judges and their opinions are subject to popular recall. What a commentary upon the fickleness and instability of the people or upon the narrowness of the courts! The dignity of our judiciary has been upheld because the courts have usually, in the first instance, planted themselves upon the immutable principles of justice and right, having due regard to the rights of property and of the individual.

Decisions: Wise and Otherwise.

It was early held that a corporation, to which had been granted a charter to operate a ferry or maintain a bridge across a river, had no exclusive right to such privilege, and that to so hold would be to create a monopoly, and that other bridges and ferries might be chartered, maintained and operated. Indeed our Court has been careful to vitalize our declaration of rights, that perpetuities and monopolies are contrary to the genius of a free people and ought not to be allowed. For example, the grant to a bank of a perpetual charter with the power of charging any rate of interest that may be agreed upon creates a special privilege and is a monopoly and void. So the grant by the city to a corporation of the exclusive use of its streets for water-works constitutes a monopoly and is void. All attempts to unduly tie up real estate or create perpetuities therein have been wisely thwarted and we adhere to the English rule laid down in *Peter Thelusson's Will case,* a life or lives in being twenty-one years thereafter. For a like reason, the *Rule in Shelley's case* is firmly engrafted into the law of real estate. To give the first taker a fee simple, though the instrument seems to convey to him only a life estate, and to construe the words heirs or heirs of the body of such first taker as words of limitation and not of purchase, puts the lands in the channels of commerce and avoids entails. As our courts have well said, "It is not a rule of construction, it is a rule of tenure, a rule of law." Professor Mordecai in his comprehensive Law Lectures gives this further reason, "Thou shalt not seethe the kid in its mother's milk.

Why not? Because the law forbids it. So with the *Rule in Shelley's case.*"

Courts have had much trouble in giving effect to limitations in deeds or wills dependent upon one dying without heirs or heirs of the body, such limitations being void for remoteness. To meet this difficulty, in 1827, the Legislature enacted that in such cases such words should be interpreted to mean when such person shall die not having such heir or issue or child living at the time of his death. What a tempest has raged around Pearson's great opinion in *Hilliard against Kearney!* This opinion is a half-century ahead of its time and in line with modern thought. It declares that when an estate is defeasible and no time is fixed on at which it is to become absolute, and the property itself is given and not the mere use of it, if there be any intermediate period between the death of the testator and the death of the legatee at which the estate may fairly be considered absolute, that time will be adopted for the reason that while, on the one hand, testators are not apt to have reference to what may happen between the making of the will and their own death, inasmuch as such an event may be provided for by a codicil or another will; on the other, it is highly improbable that they ever mean, after giving the property itself, to make the estate defeasible during the entire lifetime of the legatee and, in effect, give merely the interest or use of it, which is inconsistent with the prior gift of the property and deprives the primary object of bounty of the right ever to exercise full ownership over it—*e. g.,* A gift to A. if he arrives at the age of twenty-one, but if he dies without leaving a child the property is to go to B., the intermediate period is adopted and the gift is absolute at his age of twenty-one.

Since the act of 1827 the doctrine of Hilliard and Kearney no longer applies, it would seem. The mischief to be remedied by this act was to prevent the failure of a remainder to take effect because of remoteness. It only establishes a rule of construction by means of which the second estate could under certain circumstances be validated and upheld, and did not intend to change the nature of the first estate or make the second estate a qualification of the first. To make said act serve the further purpose of absolutely preventing a vesting of the remainder during the lifetime of the testator has created much uncertainty and has tied up estates for the use of unborn generations. We have a very wise statute authorizing the sale of contingent estates in land, and it has been liberally construed. Progress was made at one time in the unfettering of estates by opinions holding that contingencies which impart a present interest of which the future enjoyment was contingent are defeasible and may be the subject of release operating as an estoppel on the heirs and effectual as a valid conveyance. In one case a father devised to his son certain property and provided that if the son died unmarried or leaving no children the property should go to the testator's brothers or

North Carolina State Library
Raleigh

sisters. It was held that the son and the living brothers and sisters of the said testator could make a valid conveyance, and if all the brothers and sisters of the said testator should thereafter die leaving children such last-named children would be estopped by the deed of their ancestors. Of late years there has been a tendency to react from this line of cases.

This Court has not hesitated to strike down acts of the Legislature which manifestly violated the National or State constitutions. For example, a stay law staying the collection of debts was declared void, and an act providing that where an owner of swamp lands fails to pay all taxes levied or which ought to have been levied on or before a certain date, such lands should be forfeited to the State without any judicial proceedings.

The State-wide Highway Law of 1917 failed to have the approval of this Court, but it is confidently expected that in 1919 the lawmakers will enact another statute conforming to the requirements of this Court and giving our State the benefit of the same. North Carolina's climate and scenery and diversity of soil, its stretch from sea to mountains are so fine, that it is little short of a calamity that she shall not have highways alluring pleasure-seekers, like the Trossacks and the Riviera.

A good illustration of the progress of judicial opinion is furnished by the attitude of this Court to Article IX, section 3, of the Constitution, providing for a four-months school term. Twenty-five years ago the case of *Barksdale v. Commissioners* was decided by a divided Court. It was then held that an act of the Legislature authorizing the county commissioners of a county to exceed the limit of taxation provided by Article V, section 1, was unconstitutional and void. The gist of the opinion was that schools were not a necessary expense of the county, and that the equation in taxation must be observed. This was more than a fourth of a century ago. The University had not then become a part of the life of the people; there were no teachers' training schools; the public school teachers were not organized. The people of the State chaffed under the *Barksdale decision* until 1908, when *Collie's case* came to the Supreme Court, and upon the same state of facts as in the *Barksdale case,* Barksdale was reversed. The Court simply caught step with the people, and has since held that electric lights for the use of a town or city is a necessary expense. Why not schools also?

In contrast with the *Barksdale decision* is the opinion in a very recent "No-Fence Law" case. It boldly sweeps aside the earlier decisions, upholding the State policy that stock might range where they would, and that crops, not hogs, should be fenced, and declares "The defendants contend that under the decisions of the Court in *Jones* and *Laws cases* it was held that by the public policy of this State the owners of stock are allowed the privilege of letting them run at large upon the property of others without being liable for damages done by them in such tres-

passes, and that, on the contrary, the owners of crops are liable for not keeping up fences to prevent trespasses from their neighbor's stock." This loses sight of the fact that these decisions were rendered prior to the war in 1860—fifty-eight years ago—and that in the meantime the public policy of the State as to fences, as evinced by numerous statutes and provisions, is now exactly the contrary.

Statutes authorizing local tax assessments for roads, for drainage, and those regulating prohibition, upholding the jug law, enforcing vaccination, and requiring the signature of the wife and her private examination to a chattle mortgage of the household and kitchen furniture have been liberally construed and upheld. About 1870 this Court refused to give to the Legislature its opinion as to the tenure of office of the members of the General Assembly; three of the judges wrote letters declining for the reason that the Constitution of 1868 made forever separate the three departments of government. Since that time, however, this Court has receded from that position and given its opinion as to the length of the term of office of its own members.

Evidence Progressive.

One of the most difficult matters for lawmakers and judges is the law of evidence. Professor Thayer and Justice Holmes say that the law of evidence is the creature of experience, not of logic, and that the dealings of men are not dependent upon mathematical certainty. It was conceived originally that witnesses should always be present, but this was found impracticable and the general rule has become honeycombed with so-called exceptions based, as Wigmore says, on circumstantial guarantee of trustworthiness and necessity. Boundaries, pedigree and expert evidence had been recognized among the leading exceptions to the rule excluding hearsay evidence, such having been admitted from necessity; but there is at the present time an even more liberal tendency, and rules found by the business world to be safe for ordinary transactions have been adopted by the courts which are no longer pedantic, but practical.

The question was early presented in this State, whether a person not an expert could testify to one's mental condition or capacity. Judge Gaston delivered the first opinion, in the *Clary Will Case,* upholding the admissibility of such evidence. Of Judge Gaston's opinion, Redfield says that it was done with great ability, and Wigmore calls it the great law-making and argument furnishing precedent for the earlier rulings. George E. Badger, our greatest forensic orator, who enjoyed a large practice before the U. S. Supreme Court, was of counsel in the *Clary Will Case.* Evidence of this kind is not designated as expert, but opinion evidence, and the distinction is well marked.

Great progress has been made regulating the proof of handwriting. The old rule of Outlaw and Hurdle, that the jury must hear, and not

see, has yielded to the better ruling that all possible light upon this mooted question should be let in. The disputed writing and the admitted, or proven genuine writing, may now be shown to the jury and an expert witness may explain and illustrate his testimony to them and his conclusions and reasons for the same. North Carolina and Louisiana were the only States forbidding the jury to exercise their eyesight in such circumstances.

It has been held competent, in an insurance case, to ask a witness, who had known the insured intimately for months, if he was temperate in the use of liquors. This was held to be neither expert nor opinion evidence, but the statement of a fact. Train sheets made out by a train dispatcher from reports telegraphed to him by a station agent and showing the position of a train at a certain time are admissible, as are daily records kept by a recluse for his own use and showing that it rained on a given day at a given place. The court, not the jury, passes on the question of expert or nonexpert; and a wheelwright, who did not know what was the square root of 49, was admitted as an expert to testify to a question of hydraulics, the question being how much does the withdrawal of so many inches of water from a pond effect the potential capacity of its waterhead.

At first our courts were slow to admit photographs in evidence, but now not only photographs, but messages by telephone, are admitted. The mortuary tables and the charge of the judge upon request may be handed to the jury for their consideration; indeed the conduct of a well-trained dog in following the trail will not be excluded under proper safeguards.

Parol Evidence—Parol Trusts.

Our courts have a natural desire to do the right thing. This tendency exhibits itself in letting down the bars for parol evidence to vary the terms of a written instrument. When the entire contract has been reduced to writing, and there is no fraud, a relaxation of this rule is regrettable. Moffitt and Maness is the safe rule, as the latest utterances of this Court attest.

Of the Statute of Frauds an English judge remarked that each word was worth a subsidy. Professor Smith says that he is not so sure of this, though each word has undoubtedly *cost* a subsidy. The Statute of Frauds has been enacted in part only with us. The seventh section, forbidding the creation of parol trusts or confidence of lands, unless manifested or proved by some writing, is not in force. We often wish that it were. The law on the subject is in great confusion. The opinion of Pearson in *Shelton's case* has been departed from and the beneficent provisions of the Statute of Frauds occasionally set at naught. We concede that at common law no writing was necessary either to pass title or to create a trust. The vendor handed to the vendee a clod of dirt and put him in possession in the name of livery of seizin, and a trust

could then be engrafted on the land by parol. To say that the failure to enact the clause relating to parol trusts warrants the doctrine that any bargain by word of mouth concerning lands may be enforced because the specious plea of "parol trust" is relied on would seem to beg the question. What is a parol trust? It cannot exist when there is no fiduciary relationship, when neither party has title to the land, and when the party invoking the doctrine has not paid the purchase money. For example, it cannot embrace a loss of a bargain because one party has broken his word and bought at public sale lands which the other party claims the purchaser agreed to buy for him. Is not the safe rule that when there is no well-recognized trust relation between the parties the mere words of the holder of the legal title will not suffice to create such trust?

Innocent Holder for Value.

Commercial paper is, of course, the life-blood of trade, not one-hundredth of one per cent of business being based on actual money. When the rule admitting parol evidence is extended to such paper, in the hands of a holder for value, contrary to the well-recognized rules of the law-merchant, is not the life of trade imperiled? Some notes are necessarily dishonored even in the hands of an innocent holder for value and without notice; for example, those tinctured with usury or based on the violation of some statute, such as gambling, and all such notes as fail to comply with the wise provisions of our Negotiable Instrument Act. But when it was declared that a municipal bond was invalid in the hands of an innocent holder because the roll was not called three separate times in the Senate and in the House when the act authorizing the bond issue was on its passage, the credit of the State suffered. The Supreme Court at Washington soon set us right in this matter. Six and eight-cent cotton was pinching us in those days! M. V. Lanier, a great lawyer, dug up this point in the *Oxford Bond Case*. That a note due in two or three years, interest payable semi-annually, is dishonored upon failure to pay the first installment of interest, and that the party who acquired the same in due course without notice and for full value is not protected was held in an inferior court in New York and afterwards followed in this State, how wisely time will determine. Light and trifling circumstances showing knowledge of the fraud can only be justified where the transaction is of such publicity and extent that the commercial world may be presumed to have notice thereof; for example, the fraudulent sales, up and down the land, of sewing machines, Percheron horses, and the like.

"Cyc." and Liens.

We thus see that numerous changes have occurred in many departments of the law, particularly adjective law, and that both civil and

criminal procedure and practice have been revolutionized. Sanders on Pleading and Evidence, which Chief Justice Smith and my father used to tell me was the *vade mecum* of the common-law lawyer, has given place to "Cyc." and Corpus Juris. Well do I remember with what scorn these black-letter lawyers looked upon the coming out of the Encyclopedia of Law—a mechanical and alphabetical arrangement to supply the place of brains. And the advertisement of such books! How offensive! A great locomotive labeled "Cyc.," like the Bull of Basham, dashing down the track and hurling Story and Fearne and Greenleaf and Sugden and Stephen hither and yon; or else some care-worn attorney, with fingers running through dishevelled hair, and so perplexed until the A. & E. arrived, and then—all smiles! And yet the substantive law has been altered but little these hundred years— real property, wills, contracts, principal and agent, sales, executors and administrators, legacies, bailment, and the right of a citizen to personal liberty and personal security—the law governing all these subjects remains practically the same.

Our Government lives up to the principle that the laborer is worthy of his hire and makes ample provision that his wage shall be secure. The farm laborer has his lien on the crop, ahead of all other liens; the mechanic has his lien on the building; the materialman and subcontractor have their liens; the hotel and boarding-house have their lien on the baggage; the liveryman his lien on the stock; the doctor is preferred as to his services in the last illness of his patient; all classes seem to have some kind of lien except the lawyer, and he comes in only when he is acting as an officer of the court and under its orders and there is a fund created by his efforts and within the custody of the court.

Important Decisions.

The harsh rule of *Cutter v. Powell* that there can be no recovery upon a *quantum meruit* for breach of an entire contract, though it had been nearly performed, and the breach is occasioned by the death of the employee, has been greatly modified in the interest of substantial justice. One who contracted to serve for a stated period at so much a year, payable monthly, was held entitled to recover by the month, though he quit his employment before the end of the period.

The greatest good to the greatest number being the law of this Court, if one erect a dam across a floatable stream he must arrange suitable sluiceways for the convenient passage of logs and timber, and a floatable stream is held to be one down which, at ordinary seasons of rainfall, logs may be floated. And again, riparian owners may not materially diminish the flow of a stream by extracting water therefrom and to so deflect such water to the injury of lower riparian owners is actionable; as it is likewise actionable to pollute the water of a stream by allowing raw sewage therein. The watersheds of cities and towns have the

fostering aid of the court; the right to pure and wholesome water as it flows down the rivers and streams is rigidly upheld as against the right of parties up the stream to dump raw sewage therein; such latter right being a servient easement.

This Court has yielded wholeheartedly to the doctrine of the police power of the State, the safety of the people being *suprema lex.* Statutes regulating bucket shops, making it presumptive evidence of gambling to purchase any article for future delivery when no immediate delivery takes place, raising presumptions of guilt from the bare possession of a small quantity of spirituous liquors, making the place of delivery the place of sale of spirituous liquors, requiring cities, towns and manufacturing plants to put in sanitary filtration and other appliances to protect watersheds; these and many like statutes have been liberally construed by the Court to the great benefit of the people.

On the question of the constitutionality of a statute which directed the proper official to seize and confiscate fishing nets which were engaged in violating the fishing laws there was a sharp division of the Court, the majority declaring that the statute was valid.

Under the police power, and for the protection of morals, acts have been upheld making it a misdemeanor to use profane and indecent language in public places; forbidding the doing on Sunday of labor, work or business of one's ordinary calling; an act of this kind was, however, declared void which attempted to prohibit, because done on Sunday, work done in private and which did not effect public decency or disturb the religious devotions of others. The Christian religion is no part of the common law, and contracts executed on Sunday have been upheld.

The kindred right of Eminent Domain, the right of governmental agencies to appropriate the property of the citizen for general good, is a favorite of our courts. In a leading case, soon after this Court was organized, it was held that the General Assembly could acquire not only the easement, but all interest of the individual, the only restriction being that the property must be for public, not for private, uses, and that it must be upon just compensation. The Constitution makes no provision for compensation, but the principle is so grounded in natural equity that it has never been denied to be a part of the law of this State, and such compensation need not precede the taking, so that provision is made that the owner will be surely and ultimately compensated.

Contempt and Public-Service Corporation.

On the subject of contempt this Court has taken an advanced position, holding that when a trial judge was assaulted in his room at the hotel after court had adjourned for the term, though no formal announcement had been made and such assault was on account of a sentence of the judge during said term, such judge was within his rights in summarily punishing the offender for contempt. It is a matter of interest to the

friends of the Secretary of the Navy to know that the U. S. Supreme Court has just affirmed a contempt punishment of a Toledo editor in circumstances almost identical with those which so stirred our State some dozen years ago when Josephus Daniels was heavily fined by Judge Purnell and subsequently released by that brave and loyal son of the State, Judge Jeter C. Pritchard. The vigorous dissent of Justice Holmes in the Toledo case must be the law. It cannot be otherwise in a free republic.

This State and perhaps Texas seem to be the only jurisdictions in which mental anguish is recoverable for a negligent failure to deliver a telegram designated as a death message. Such cases, in their various ramifications, are indeed a puzzle to our courts. Public-service corporations have been held liable in damages, actual and compensatory, for the violation of contracts with the public, and such damages may likewise embrace any humiliation or disgrace thereby occasioned. And we are one of the few States permitting an injured party to sue into a water contract made by a water company with a city and guaranteeing flow and pressure of water sufficient for domestic and fire purposes, which contract had been broken by the company with resulting injury.

Negligence Master and Servant.

No branch of the law has undergone greater change than the law of negligence, particularly as between master and servant. Has not the time about come in America, as it has actually come in England, when a servant engaged in complicated work must be compensated for injuries occurring while in the performance of duty, though the master be not negligent? Society is so complicated and the proper relation of man to man such that the stronger must bear the burdens of the weaker. With the abolition of the fellow-servant rule and of the assumption of risk a long step forward was taken; and though we have no employers' compensation act, this Court has been at all times liberal and astute to discover evidence of negligence. Thus it is negligence in the master not to instruct a green hand working with complicated machinery. The failing to promulgate reasonably safe rules for doing work, in such cases, is likewise negligent; and so is the failure, periodically, to inspect elevators and other dangerous appliances. The duty of the master to furnish safe appliances, a safe place, and to make reasonably safe rules for the servant is enforced with vigor. At one time, under the catch phrase "the continuous negligent omission of duty," it seemed that the servant might recover for the negligence of the master who failed in this primary duty, although the servant was himself guilty of contributory negligence. But, at the first opportunity, this was reversed and it was held not true as an abstract proposition that the defense of contributory negligence is not available to the defendant in such cases. If the in-

jured party is negligent (except when engaged in railroading, which is now regulated by a statute conforming to the Federal statute), and such negligence is the proximate cause of his injury, he is barred. The employee of a manufacturing plant assumes all risks incident to his employment, except as to defective appliances, which he does not assume unless the defect is so obviously dangerous that no prudent man would continue to work and incur the risks. If an infant under the statutory age is employed in a factory and is injured, the employer is liable, although the infant was not at the time in the actual line of his work. So the owner of a railroad is liable for the negligence of its lessee in operating the road.

The doctrine of the last clear chance (Davies and Mann) has been adopted by our courts. So far has this been carried that it is really an advantage to the cause of the plaintiff that his intestate was drunk and down on the track when killed, because the engineer could have discovered his peril the more readily. It is negligence not to stop the train for one that could be seen by the engineer on a trestle or bridge, or for an infant. This rule was, however, not adopted without a stiff dissent. It is not negligence not to stop the train for a person walking on the track and apparently in possession of his faculties. It is presumed that he will get off, and this presumption protects the railroad until the moment of impact. Such holdings as *Smith v. Railroad,* that one riding in a passenger coach attached to a freight train and standing up between the seats was thereby guilty of such contributory negligence that he could not recover damages if injured by the negligent jerking of the train sounds harsh a third of a century later.

"Upon the whole," says Professor Mordecai, "I take it that we may consider the law of this State now to be: That the principal is liable for the negligence, unskillfulness, frauds, trespasses and torts of his agent, although such trespasses and torts be willful, wanton and malicious; provided they be done either by the direction, assent or authority of the principal, or are subsequently ratified by him, or are committed by the agent in the prosecution of the principal's business or within the scope of such agent's employment in the discharge of duties assigned to him and while in the discharge thereof; or it seems, if the act be done with the belief that it will benefit the principal and with the intention to advance his interests, and that this applies alike to individuals and corporations, although the distinctions between individuals and corporations and between different classes of corporations heretofore pointed out may exist. If the wrongful act of the employee be wanton and malicious, only compensatory damages will be allowed, even against railroads. Railroad corporations are liable for injury, insult, violence and ill-treatment to passengers inflicted by their employees, though such injuries be the result of the willful and malicious act of an employee, and

although the employee acted in consequence of charges made against him and epithets applied to him by the passenger such as no good man would deserve and no brave man would submit to."

Chief Justice Ruffin—Equity.

When this Court was organized there were no text-books or treatises of value on the subject of Equity. Blackstone devotes less than twenty pages of his commentaries to it. The fame of our great Chief Justice Ruffin rests for all time upon his comprehensive grasp of this subject. He blazed the way, and his fame is greater as time passes—of him and of Lemuel Shaw, Chief Justice of Massachusetts, and of John Gibson, Chief Justice of Pennsylvania, and of Charles Doe, Chief Justice of New Hampshire, Professor Pound, Dean of the Harvard Law School, declares that they are the greatest judges that have adorned a State bench.

Negro Legislation.

If I could I would let this occasion pass without a discordant note; but he is a false prophet who speaks only smooth things. From John Morley's Diary of September 1, 1910, I read: "Today Booker Washington comes to Skibo, where I am staying, being a great friend of my host's. I had talks with him when I was in America, six years ago. The future of the negro in the United States has always profoundly interested and excited me, as well it might. What will their numbers amount to twenty or fifty years hence? Terrible to think of it! Talk of India and other insoluble problems of great states, I declare the American negro often strikes me as the hardest of them all."

These words were spoken by a friend of America, a careful and wise statesman, a liberal and an optimist. Shall we take them to heart? So long had England shut her ears to Ireland's plea that when her day of trial came (July 31, 1914) hundreds of thousands of British soldiers were required to guard other hundreds of thousands of discontented Irishmen, more than a million men remaining inactive while the pillars of civilization were being torn away. Had the great war broken out in the days of Populism, when the negro was contending for his rights, what would have been the consequences! And when another war shall come and the negro is smarting under the servitude in which an inexorable fate has placed him and must keep him, God pity us of the South.

We do not apologize for, nor would we undo, one piece of North Carolina legislation affecting the negro. The constitutional amendment taking away his vote is necessary, and so are the laws separating whites and blacks *toto coelo* in railroad trains, street cars, theaters, and other public places. If two races occupy the same country on an equality, the end has always been amalgamation. Ethnologists say that this will be our fate. I do not think so. The last sixty years have deepened the

instinct of race prejudice and the danger lies another way. Even in this calm and judicial presence, let me say that as things now stand, the alternatives are: amalgamation, extermination, emigration, or servitude. I have my views, but this is neither the time nor place to promulgate them.

Sidelights on this Court, Etc.

There are some sidelights on the legal and legislative history of the last hundred years that may be of interest. One of the most noted dissents, considering the personal consequences, is Pearson's, in *Spruill v. Leary,* the dissenting opinion becoming the law in *Myers v. Craig.* The point as at first decided was that collateral warranty barred the heirs of the warrantor and those claiming under him—really too dry a subject to have caused any unpleasantness between the two eminent Chief Justices. The earnest dissent of Ruffin in *Wiswall against Brinson,* that if a landowner was answerable in damages for negligence of one employed to move a house, the whole of life would fall into the relationship of master and servant, profoundly impressed the older lawyers and has been quoted in Westminster Hall. Rodman's dissent in *Long v. Long* no doubt changed the law in divorce matters, bringing about section 1561 (4) of the Revisal. The humane dissent of Battle changed the rule excluding threats of the deceased communicated to the prisoner. The dissent of Merrimon in the *Barksdale case* disclosed his larger vision. Bynum's dissent in the North Carolina lease matter gave him merited fame; as did the dissent of the present Chief Justice in the *Office Holding Cases;* and his dissenting opinions in the matter of contracts of married women and of the homestead led up, respectively, to the Martin Act, which allows the wife to contract without the joinder of her husband, and to such a change in the law of homestead that when a homestead is now sold it ceases to be exempt in the hands of the purchaser. Iredell's dissent in *Chisholm v. Georgia,* as is well known, brought about the Eleventh Amendment of the Constitution. Bartholomew F. Moore's brief in *State v. Will,* a slave, is one of the most impressive documents on file. It may be found in Peele's *Distinguished North Carolinians.* It advocated the right of a slave to slay his master in self-defense, and saved his life. The most important civil cause, considering the length of the trial, the amount involved, the ability of the attorneys engaged, the prominence of the trial judge and of the suitors and witnesses, is the *Johnson Will Case.* It is in a class to itself. The cause which aroused most bitterness, dividing a great denomination, and coming four times to this Court, was *Gattis and Kilgo.* The decisions in the *Alsbrook case,* putting the W. & W. R. R. on the tax books, though exempted from taxation by charter; and in the *Selma Connection case,* requiring the railroad to make convenient connection with Raleigh, were affirmed by the U. S. Supreme Court and are far-reaching and pro-

gressive in sweep and novelty. The most exciting and dramatic criminal cause was *State v. Boyle.*

Prior to the Sixty-third Reports, no writ of error had gone from this Court to the Supreme Court at Washington. Since then fifty-nine writs of error have been disposed of by said Court, with the following results:

Dismissed	17
Affirmed	20
Reversed	22
	59

Affirmances, 47 per cent of appeals. This Court, disregarding Chief Justice Bleckley's caution that a Court reverse all errors except its own, has overruled itself one hundred and seventy times in a hundred years. The longest term of service on this bench is that of the present Chief Justice—thirty years; next in length of service come Pearson and Ruffin, twenty-nine years and ten days and twenty-five years each, respectively. The longest term of service on the Superior Court bench was John M. Dick's twenty-seven years. Judge Oliver H. Allen, now of our Superior Court bench, is a veteran of twenty-one years service. Of the olden day, the legislator having the longest service was Joseph Riddick of Gates—twenty-nine years in the House and four years in the Senate—thirty-three in all; and Harry W. Stubbs of Martin has to his credit a longer legislative record than any living man—twenty-four years in Senate and House. *Amicus Curiæ* of this Court, for years and years, was Patrick Henry Winston, Sr., whose argument won *Cloud v. Webb,* and to whom Pearson pays high tribute in *Day v. Howard.*

Apostrophe to Judges.

The task which the partiality of my brethren has assigned me is now completed. Patriotic duties to our country, before the great war ended and since, and a busy professional life, made more onerous by the absence of a son, now a captain in that war, have prevented a more comprehensive review of this interesting subject. Sometimes when friends have gathered around the fireside in a sister State I have heard those who have made a study of North Carolina remark, "You North Carolina folks have a great way of knowing one another; you seem to be one big family." And so we are, both as to the quick and the dead. And the spirit of the departed, who wrought and labored in these halls, and many of whom look down upon us from these walls, seems to be about us on this interesting occasion—Taylor, the Mansfield of the bench; the strong-minded Henderson; the well-furnished Hall and Daniel; Ruffin, the stern and clear-minded prophet; Gaston, the man of

righteousness; the courtly Toomer; the profound Nash; the dependable Battle; the versatile and original Pearson; the accomplished Manly; Reade, the caustic logician; Smith, the well-versed jurist; Bynum, Rodman, and Boyden, profound students of the law; Dick, the belle-letter scholar; the slow but safe Faircloth; Settle, the statesman; Ashe, every inch the judge; Dillard, the sweet-spirited dispenser of justice and equity; Merrimon, the free lance; Ruffin, Jr., a terror to frauds and shams; honest Joe Davis; the imperious Avery; the erudite and discriminating Shepherd; the incisive MacRae; the well-rounded Burwell; the rugged Furches; the lovable Cook; and the legal idealist, Douglass, and their successors surviving—all, all, are in this presence today.

The mariner of old said to Neptune, in a great tempest: "O God! thou mayest save me if thou wilt, or if thou wilt thou mayest destroy me; but whether or no, I will steer my rudder true." Through sunshine and shadow, these hundred eventful years, this, too, has been the prayer of North Carolina judges.

Mr. President and gentlemen of the Supreme Court, North Carolina has a right to our love and pride. "Behold her and judge for yourselves."

Some Authorities and Comment.

To preserve something of the flavor of our law and for benefit of younger brethren, let me append:

Lord Denman's Act (see Rev., 1628) allows defendant in civil action to testify, passed in 1866; in criminal cases defendant allowed to testify in 1881. Lord Campbell's Act, recovery for death by wrongful act, Rev., sec. 59.

Important statutes and decisions relating to real estate: Act of 1827, construes contingent limitations, Rev., 1851; act of 1903 authorizes sale of contingent interests, Rev., 1590; act defining seisin ("Asa Biggs Act"), Rev., 1556, Rule 12; act 1879, making deed fee simple without word "heirs," Rev., 946; act 1885, Connor Act, requiring registration of all deeds, Rev., 980; act 1891, to cure vagueness of description, Rev., 948; act 1893, quieting title, Jacob Battle Act, Rev., 1589.

Perhaps greatest legal battles have waged around act 1827: *Hilliard v. Kearney*, 45—221, leading case before act; since act, Shepherd's great opinion, *Starnes v. Hill*, 112—1; 134—24; 165—20. Martin Act, Laws 1911, ch. 109; Fellow-servant Statute, Rev., 2646; Laws 1897, ch. 56; acts abolishing contributory negligence and assumption of risk, Laws 1913, ch. 6; 1915, ch. 356. Judge Asa Biggs lost *Lawrence v. Pitt*, 46—352 (a life estate depriving his client of seisin); next session, he being a member, the Legislature defined seisin to be any interest in freehold. The common-law definition of seisin would seem to deprive one of homestead in remainder or reversion, 87—79; and widow would have no

North Carolina State Library
Raleigh

dower therein, 90—189. *Dos de dote!* Act quieting title is liberally construed, 154—157; 151—615; 173—525. The contingent remainder act is constitutional and a favorite, 142—154; 165—64; 132—549; fountain-head of doctrine, *Ex Parte Dodd,* 62—97; act of 1879, "Heirs" statute, liberally construed, 133—5; prior to statute, see *Vickers v. Leigh,* 104—257, title to large part of Durham City confirmed by labors of W. W. Fuller.

Safe rule governing parol trust, *Shelton's case,* 58—292; 64—772; *contra,* 151—26. Evidence progressive, 145—385; 147—564; 138—337. *Outlaw v. Hurdle,* 46—150. *Clary Will Case,* 24—78.

Negotiable Instrument Act, Rev., ch. 54, resolves scores of doubtful points governing bills, etc. (not sufficiently studied by the profession). *Farthing v. Dark,* 109—291, dangerous doctrine, subsequently overruled; *do.,* 153—475. Recovery on special contracts: *Cutter v. Powell,* an English case; doctrine repudiated: *Gorman v. Bellemy,* 82—497; 95—98. *Leak v. Gay,* 107—468, overruled in *Thornton v. Vanstory,* 113—196 (after funds distributed in former case). *Cheek v. Walker,* 138-446, upholding a deed by contingent remainderman and his "living" heirs, has lost favor with the Court in some recent decisions. Rights of riparian owners in floatable stream, 116—731. Judges giving opinions as to term of office, 64—785.

Burke's "Reflections on French Revolution."

Connor, R. D. W., "Ante-bellum Builders of North Carolina."

Bryce's "American Commonwealths."

Blackstone, Vol. I, Feudal System.

Sprunt's "Chronicles of the Cape Fear."

Battle's History of the Supreme Court, 103 N. C. Reports.

Morley's Recollections.

Connor & Cheshire's "North Carolina Constitution."

Mordecai's Law Lectures.

"Two Centuries Growth of American Law."

MITCHELL
PRINTING CO
RALEIGH N.C.

BC 22507

GC 340.09756 W783c
c. 2
Winston, Robert W. (Robert Watson), 1860
A century of law in North Carolina /
3 3091 00225 0785

DATE DUE

FEB 16 1995			
MAY 23 1995			
GAYLORD			PRINTED IN U.S.A.

Gaylord
PAMPHLET BINDER
Syracuse, N. Y.
Stockton, Calif.

340.09756
W783c
c.2

Winston

A century of law in North Carolina

340.09756
W783c

Winston

A century of law in North Carolina